RECORD AND BRIEFS

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No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND
JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,

Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICI CURIAE* WILLIAM JACK AND THE NATIONAL CENTER FOR LAW AND POLICY IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

William Jack is a Colorado citizen and Christian educator who teaches nationally on issues of Christian worldview, apologetics, and leadership. In 2014 Jack was refused service at three Colorado bakeries when he requested two cakes in the shape of a Bible to be decorated with the text of three Bible verses. After being refused service because of his creed—with the overt Christian message of his desired cake design—Jack filed charges of discrimination with the Colorado Civil Rights Division for violation of Colorado's public accommodations statute, C.R.S. § 24-34-601(2).

Jack's charges of discrimination were denied by the Division and upheld by the Colorado Civil Rights Commission largely because the bakeries refused to make a cake with a message the bakers considered objectionable. In its refusal to protect Jack from discrimination, the Commission demeaned Jack's religious beliefs as being discriminatory and not worthy of governmental protection. Jack has an interest in this Court reversing the ruling below because government officials have unconstitutionally applied their laws to discriminate against people who believe—as a matter of deeply held religious conviction—that marriage is inherently a union between one man and one woman.

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk as required by Rule 37.2(a).

The National Center for Law and Policy ("NCLP") is a non-profit legal and public policy advocacy organization that has, since its inception, promoted and defended constitutionally protected rights of conscience and religious freedom in the courts and culture. The NCLP is deeply concerned about the future of religious freedom in the United States, including the growing threat state anti-discrimination statutes pose to the constitutionally protected liberties of individuals, groups, and organizations to believe, express, and live out their religious faith, free from the oppressive burden of coercive governmental control.

SUMMARY OF ARGUMENT

The Colorado Civil Rights Commission has demonstrated a willingness to allow bakers to decline to make a custom cake when the message of the cake is objectionable or offensive to the baker, but only if the rejected message is religious or critical of same-sex marriage. A baker must create a cake when the message endorses same-sex marriage. Amici William Jack requested custom cakes with a religious message at three different Denver bakeries, only to be refused service because the bakers disagreed with the religious message. In a set of results that cannot be reconciled with the Masterpiece Cakeshop charge of discrimination, the Commission rejected Jack's charges of discrimination, thereby allowed bakers to decline to make a cake deemed offensive. In this process the Commission expressed hostility towards Jack's traditional religious views.

The Commission's disfavored treatment of a religious customer exposes the arbitrary and unequal

enforcement practices of Colorado's public accommodations laws. The troubling inconsistency in enforcement both transgresses traditional notions of Due Process and proves that the law cannot be considered neutral and generally applicable for purposes of the Free Exercise clause. Furthermore, the lack of consistent enforcement precludes the Commission from satisfying the strictures of strict scrutiny.

Finally, by allowing three bakeries to deny service to a religious patron, the Commission has diminished the dignity of Jack's traditional, if currently unpopular, views about same-sex marriage. The Commission's actions thereby threaten to perpetuate dignitary harms on many other religious citizens in the state under the guise of nondiscrimination. As Jack explained to the Commission, he was demeaned for his Christian creed and the three bakers' prejudicial actions discriminated against him for holding sincerely held religious beliefs, as expressed by requested the text of some Bible verses to appear on cakes. The Court should reverse the decision below.

ARGUMENT

I. The Commission Protects Bakers Who Decline to Make Cakes Expressing Criticism of Same-Sex Marriage.

A baker in Colorado is free to refuse to bake a custom cake if the requested cake design is—in the eyes of the baker—offensive or objectionable, but only if the unpopular message is a religious view critical of same-sex marriage. When Masterpiece Cakeshop,

however, declined to make a custom cake celebrating a same-sex marriage no such exception applied. This glaring inconsistency cannot be squared with Free Speech and Free Exercise rights. As detailed below, Amicus Jack filed three charges of discrimination with the Colorado Civil Rights Division because he was subject to unequal treatment and denial of service based on his religious creed: Christianity.

In contrast to what occurred in *Masterpiece Cakeshop*, all three charges of discrimination were summarily rejected when the government deemed quotations of Bible verses to be "discriminatory." *E.g.* Colo. Civ. Rights Div. Charge No. P20140069X, "Determination" (March 24, 2015), JA234. The Colorado Court of Appeals reviewed all three determinations and found them "distinguishable" because the bakers who refused service to a Christian customer did so because of the "offensive nature of the requested message." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo. Ct. App. 2015). In so doing, the Commission is communicating to the citizens of Colorado that it will not enforce public accommodations laws when the business refuses to promote speech the government disfavors (Jack's situation), but will enforce the law when a business declines to promote speech the government favors (Masterpiece Cakeshop). Contrary to the court below, the Jack cases cannot be readily distinguished from the Masterpiece Cakeshop cases.

A. *Jack v. Azucar Bakery* (Charge No. P20140069X): Commission protects baker from being forced to make cake with message considered offensive.

In March 2014, Jack entered Azucar Bakery in Denver and met with the Pastry Chef to request a quote for two cakes to be made in the shape of open Bibles. Jack requested that the cakes be decorated with Biblical text as well as images related to his religious opposition to same-sex marriage.[2] At no time did Jack ask the bakery or its employees to agree with or endorse the message of the envisioned cakes. After taking the request, the employee left to confer with the owner of Azucar Bakery. Later that day, the bakery refused to make the requested cakes.

When responding to Jack's charge of discrimination, Azucar's owner explained that the order was refused because the baker determined the design would "request us to write discriminatory words against the GTLB community" (referring to Bible verses) and the baker "refused to write and draw what we felt was discriminatory against gays."

Ultimately, the Commission affirmed the dismissal of Jack's charge even after finding that Jack himself was a member of a protected class based on his creed of Christianity and Azucar Bakery was a place of public accommodation. Instead, the Division, as affirmed by the Commission, announced there was

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[2] One cake was to have Psalm 45:7 ("God hates sin") and Leviticus 18:2 ("Homosexuality is a detestable sin."), while the other would say "God loves sinners" and Romans 5:8 ("While we were yet sinners Christ died for us.").

insufficient evidence that Jack was treated differently than customers outside his protected class.

For the undisputed denial of service, the Division held that the "circumstances do not give rise to the inference that the Respondent denied the Charging Party goods or services based on his creed.... Instead, the Respondent's denial was based on the explicit message that the Charging Party wished to include on the cakes, which Respondent deemed as discriminatory." JA237. It was noted that the bakery regularly served other Christian customers and made cakes with different Christian symbolism. JA 235-36.

As with the circumstances in *Masterpiece Cakeshop*, Azucar Bakery found the message and symbolism of the requested cake objectionable. Azucar Bakery, again like the baker in *Masterpiece Cakeshop*, expressed a willingness to serve members of the protected class for other types of cakes or goods and services. Ultimately, the Commission approved the denial of service by Azucar Bakery because the baker objected to creating a cake that reflected a message the baker did not wish to convey.

B. *Jack v. Gateaux, Ltd.* (Charge No. P20140071X): Commission protects baker from being forced to make cake with message considered offensive.

In March 2014, Jack went to Gateaux Bakery in Denver to request quotes for two cakes in the shape of an open Bible with each cake decorated with the text of Bible verses. The requested verses and imagery was the same as requested by Jack at Azucar Bakery,

supra p.4-5. Jack explained to the Colorado Civil Rights Division that Gateaux Bakery was willing to make the Bible-shaped cakes until it reviewed the Scriptures to be quoted, at which time when it declined to make them.

Gateaux Bakery claimed that it refused to make the requested cakes because of "technical capabilities." However, the bakery added that it had previously declined to make cakes when customers requested "messages [that] were not what [Gateaux Bakery] wished to represent in its products," such as cakes with crude language like "eat me" or "ya old bitch" or "naughty images." Colo. Civ. Rights Div. Charge No. P20140071X, "Determination"(March 24, 2015), JA249, JA254. The Division, as fully affirmed by the Commission, found there was no legal violation because Gateaux Bakery "would not create cakes with wording and images it deemed derogatory." JA255. It also noted that the bakery "regularly produces cakes and other baked goods with Christian symbolism and messages, and continues to welcome the Charging Party in its bakery" JA257.

As with Masterpiece Cakeshop, Gateaux Bakery did not wish to create a custom cake which communicated a message that in the view of the creative professional was offensive. Even so, Gateaux Bakery, similar to Masterpiece Cakeshop, expressed a willingness to serve members of the protected class, including the individual denied service, so long as the requested product was different than the cake believed to communicate an undesired message.

C. *Jack v. Le Bakery Sensual, Inc.* (Charge No. P2014000X): Commission protects baker from being forced to make cake with message considered offensive.

In March 2014, Jack went to Le Bakery Sensual in Denver to request two custom cakes with similar imagery and Bible verses as requested at Azucar Bakery, supra p.4-5. The owner of Le Bakery Sensual met with Jack. Initially, the owner told Jack that he "had done open Bibles and books many times and they look amazing." However, once Jack described the imagery, which was intended to "indicate that same-sex unions are un-biblical" as well as providing the scriptural texts, the owner refused to make the two cakes "because he deemed the requested cake 'hateful.'" Colo. Civ. Rights Div. Charge No. P20140070X, "Determination" (March 24, 2015), JA243. Jack made clear to the Division that he did not ask the bakery or its employees to agree with or endorse the message of the two envisioned cakes.

Le Bakery Sensual defended the refusal to create the cake by stating that Jack and everyone else in a protected class is "welcome" at its bakery. The bakery characterized Jack's requested cakes as being "intended to 'denigrate individuals of a specific sexual orientation.'" Le Bakery Sensual told the Civil Rights Division it "has a constitutional right to speak or not to speak as he chooses and is absolutely protected by the *First Amendment* from being forced to communicate someone else's message. *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). Application of Colorado's public accommodation statute as asserted

by Mr. Jack would have the effect of compelling Le Bakery Sensual to affirm and promote a belief that Le Bakery Sensual does not agree with. Such compelled speech is unconstitutional." (emphasis original).

The Division, as fully affirmed by the Commission, concurred and found no legal violation from the denial of service since the bakery denied the request because "the cakes include language and images [Le Bakery Sensual] deemed hateful." "Determination," JA246. Likewise, it found the bakery was prepared to make the requested cakes until the specific imagery and allegedly "'hateful' Biblical verses" were requested. The Commission found no legal violation. JA247.

Le Bakery Sensual, like Masterpiece Cakeshop, believed the creation of the requested cake would communicate a message deemed objectionable to the bakery. Likewise, Le Bakery Sensual and Masterpiece Cakeshop expressed a willingness to serve members of the protected class, including the individual who requested the cake that the bakery could not in good conscience create.

* * *

In all three charges of discrimination and in the *Masterpiece Cakeshop* case, the Colorado Civil Rights Commission belittled the religious views critical of same-sex marriage as odious discrimination unworthy of any legal protection, regardless of the sincerity of the religious belief at issue. And in all three Jack charges of discrimination, but not in *Masterpiece Cakeshop*, the government gave credence

to the baker's willingness to serve members of a protected class, including the complaining party, so long as the requested service did not require creation of artistic expression that violated the conscience of the baker.

In other words, when unpopular religious messages about same-sex marriage are at issue, the Commission disfavors religion, but is willing to allow a business to decline a customized request that is deemed offensive. This same conscience affirming rule, if applied neutrally, would have precluded any finding of discrimination against Masterpiece Cakeshop.

II. By Consistently Disfavoring Traditional Christian Views on Marriage, Colorado Undermines any State Interest for Compelling Masterpiece Cakeshop to Create a Custom Cake in Violation of Conscience Rights.

The divergent treatment of the claimed discrimination in Masterpiece Cakeshop and the three charges filed by Jack undermines the legal positions taken by the Commission in this case. The contradictory enforcement practices that consistently target traditional religious beliefs for disfavored treatment call into question the ability of the state to neutrally and fairly enforce nondiscrimination laws.

A. Colorado's arbitrary and contradictory enforcement of its public accommodations law transgresses fundamental Due Process principles.

It has long been held that Due Process requires penal statutes to define an offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). These requirements have also been embraced by this Court's void-for-vagueness doctrine. *Skilling v. United States*, 561 U.S. 358, 364 (2010); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (Due Process aims to prevent arbitrary and capricious enforcement). Colorado has acted arbitrarily with the enforcement actions against Masterpiece Cakeshop and the three bakeries subject to Jack's charges of discrimination.

In one case, the state dismisses as a "distinction without a difference" the baker's reluctance to create a cake based on the message of the specific cake, not the status of the person requesting the cake, while in the other three cases, the state gives the same fact substantial weight and deference. Pet. App. 69a. Even more arbitrary, the Division creates an exception from the nondiscrimination law for cakes that are viewed as objectionable or offensive, but only applies that exception to bakers who favor same-sex relationships and not the baker who has religious objections to same-sex marriage. The enforcement and lack of enforcement between the four bakers fits the very definition of arbitrary and discriminatory enforcement, calling into question the

constitutionality of the entire enforcement scheme. An enforcement practice that fails basic Due Process standards cannot, by definition, be a neutral and generally applicable law for purposes of Free Exercise doctrine, as discussed below.

B. Colorado's public accommodation law is not a neutral, generally applicable law for purposes of Free Exercise rights.

Since *Employment Division v. Smith*, 494 U.S. 872 (1990), claims under the Free Exercise clause have required courts to determine if the state action in question is one of neutral, generally applicable laws, in which case a lower level of scrutiny applies, or instead (1) laws that are neither neutral nor generally applicable," (2) laws with individualized assessments, or (3) situations involving a hybrid of constitutional rights, where a higher level of scrutiny applies. *Id.* at 878, 882; *see generally Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 536, 542-43 66-67 (1993) (reviewing standards for neutral generally applicable laws).

Furthermore, in *Lukumi* this Court took a critical look at how a law was enforced, not just whether the text of the law was neutral, for "[t]he Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause forbids subtle departures from neutrality." *Id.* at 534 (1993) (internal quotation marks omitted) (citation omitted). The Colorado laws at issue have substantial disparity in enforcement practices.

The Colorado Civil Rights Commission's refusal to apply nondiscrimination laws against the three bakers subject to Jack's charges of discrimination

shows both that the Colorado law is not generally applicable and that it calls for individualized assessments, thereby requiring the state to satisfy strict scrutiny. By targeting the enforcement of the law only against traditional religious views about marriage, the state has proven the law is not neutral and generally applicable. Likewise, by considering the personal, subjective intent of the bakery in denying service as a relevant defense to claimed discrimination, the Commission has also shown how the public accommodations laws require the government to make individualized assessments in each given case.

Finally, the application of exemptions from a purportedly neutral law to the exclusion of disfavored religious adherents is a well-known way of achieving a religious gerrymander that calls for a higher level of Free Exercise scrutiny. *See Lukumi*, 508 U.S. at 536-37 (discussing series of exemptions to animal killing ordinance that resulted in unique burdens on an unpopular religious minority). Accordingly, the individualized assessment of each claimed public accommodations law violation works to elevate the Free Exercise claim to the level of strict scrutiny. *Id.* at 546.

Under the strict scrutiny standard for either Jack Phillips' Free Speech or Free Exercise claims, Colorado's conflicted and unequal enforcement practices are fatal. If the State has a compelling interest in eliminating discrimination in the form of refusal to create a custom product for buyers, then it must show that this interest is pursued consistently, not just when the request is made to a religious business owner who opposes same-sex marriage on

religious grounds as opposed to a business owner who supports same-sex marriage. Colorado allowed all three bakeries that denied service to Jack to be free from legal compulsion because the bakers found the religious message of a cake offensive, regardless of the customer's status as a member of a protected class. By way of contrast, it forbade the Masterpiece Cakeshop bakery to decline to create a custom cake based on sincerely held religious objections and compelled it to celebrate a same-sex marriage looking to the protected class of the customer. The only consistency in the Commission's action is its targeted rejection of religious beliefs against same-sex marriage.

This Court has repeatedly warned against this type of hostility by the government towards religion. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); *and R. A. V. v. St. Paul*, 505 U.S. 377, 386 (1992) (in Free Speech context government may not regulate based on hostility or favoritism towards underlying message).

III. The Dignity of Religious Practitioners is Undermined by Colorado's One-sided Enforcement against Traditional Christian Beliefs about Marriage.

The dignity of all religious believers is at issue in this case. Colorado acted to diminish the dignity of Amici Jack and his traditional religious beliefs when it allowed businesses to reject his request for customized cakes that reflected his religious beliefs

about marriage. In essence, the Commission permitted three bakeries to discriminate against Jack because the bakers considered his requested Bible verses to be "derogatory," "hateful," "shameful," "discriminatory," and "offensive." As Jack explained to the government before the charges of discrimination were rejected:

> I am the one who was demeaned as a Christian for my creed. I was the one made to feel like a second-class citizen due to [the baker's] prejudicial action against my creed. I was the one discriminated against for holding to what the Bible teaches, that certain actions such as homosexuality are considered unacceptable by a Holy God, and that all people are sinners in need of a Savior, Jesus Christ.

By rejecting his requested cake design, based entirely on the content of the Bible verses requested, Jack's religious views were "despised and disparaged." The bakers' refusal to provide service on account of religious beliefs was "demeaning to [Jack's] belief in the veracity of the Bible. The Christian faith was denigrated..." There is no doubt that the dignity of Jack's sincerely held religious views on marriage were belittled and insulted by Colorado's decision establishing that religious views deemed to be offensive are not worthy of protection as compared to other religious beliefs.

Moreover, the State has denigrated the sincerely held religious beliefs of many others, not just Jack, by compelling a religious baker to produce a cake for a

same-sex wedding celebration, in spite of his religious conscience, while dismissing multiple cases of bakeries refusing to serve a Christian who desired to express a religious view critical of same-sex marriage. The Free Exercise Clause works to protect the dignity of religious believers. *See Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). And, religious objections to same-sex marriage have been described as "decent and honorable" by this Court. *Obergefell v. Hodges*, 135 S. Ct. 2584,2602 (2015).

The undeniable message to all religious citizens who hold traditional views similar to those of Masterpiece Cakeshop or Jack is that your views are odious and unworthy of respect in civil society. Free Speech works to protect unpopular speakers and views from being silenced, as this Court has long explained:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Cohen v. California, 403 U.S. 15, 24 (1971). With society even more diverse and populous than in the past, protections for the freedom of thought and

expression for those who hold views that others believe to be offensive are critical to protecting the American way of life.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Colorado Court of Appeals and hold that the Commission's order violates the Petitioners' First Amendment rights.

Respectfully submitted,

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